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Immunocept, LLC, et al v. Fulbright & Jaworski Doc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
MAY 31 2005
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WESTERN DISTRICT OF TEXAS
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IMMUNOCEPT, LLC, PATRICE ANNE LEE, AND JAMES REESE MATSON,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	**CAUSE NO. A 05 CA 334 SS**
	§	
FULBRIGHT & JAWORSKI, LLP,	§	
	§	
Defendant.	§	

PLAINTIFFS' FIRST AMENDED COMPLAINT

TO THE HONORABLE COURT:

COMES NOW Plaintiffs Immunocept, LLC, Patrice Anne Lee, and James Reese Matson (collectively "Plaintiffs") complaining of Fulbright & Jaworski, LLP ("Defendant"), and for causes of action would show the Court the following.

I. PARTIES

1. Plaintiff Immunocept, LLC is a Texas limited liability company with its principal place of business in Dallas, Texas.

2. Plaintiff Patrice Anne Lee is an individual residing in Colorado.

3. Plaintiff James Reese Matson is an individual residing in Dallas County, Texas.

4. Defendant Fulbright & Jaworski, LLP is a Texas limited liability partnership. Fulbright & Jaworski may be served with process by serving one of Fulbright & Jaworski's partners.

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II. JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this litigation pursuant to 28 U.S.C. § 1338(a) in that Plaintiffs' right to relief depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of Plaintiffs' claim in this matter.

6. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(1) because Defendant Fulbright & Jaworski resides in this district.

III. FACTUAL BACKGROUND

7. Patrice Anne Lee, Robert Wilton Pryor, and James Reese Matson (collectively, the "Inventors") are medical professionals and researchers. The individual plaintiffs assigned to Plaintiff Immunocept, LLC the intellectual property in question, along with all ancillary rights and claims. Beginning in the 1980's, the Inventors researched, invented and tested a revolutionary medical device for the treatment of sepsis and septic shock in medical patients.

8. Specifically, the Inventors discovered a device, mechanism, means, and method for treating a condition called Systemic Inflammatory Response Syndrome ("SIRS"), as well as related conditions, all as more specifically described in the patent described below. SIRS occurs when the body releases certain inflammatory mediators into the blood in response to traumatic physical injury, major surgery, or infectious disease. Within certain limits, SIRS is beneficial to the body as it helps promote the removal of dead tissue, healing of injured tissue and the mobilization of the body's defenses to resist or combat infection. However, if the underlying trauma or disease stimulating the reaction is severe enough, SIRS can be excessive, and become quite deadly, causing excessive inflammation that leads to the destruction of vital organ tissue – a dangerous condition known as sepsis or septic shock ("SSS"). Ultimately, SSS can lead to multi-organ system failure and death. Indeed, SSS is the most common cause of death in

intensive care unit patients and the 13th most common cause of death in the general population in the United States, killing as many as 275,000 people in the United States per year.

9. The Inventors began their research at a particularly propitious time. Despite others' efforts, no truly effective treatment therapy for SSS existed. Indeed, the only available treatment for those afflicted with SSS is referred to as "supportive therapy" which means attempting to keep the patient alive, hoping that the condition will abate. In spite of the best medical care, the mortality rate of patients with SSS ranged from 30% up to 80%, depending on various factors.

10. The Inventors' key insight into this field was to approach the problem of reducing or mitigating the inflammatory mediators in the blood by filtering out the excessive portions of the mediators with an external blood filtering device. The idea was to treat SSS by continuously removing the blood from the body, filtering out the excessive toxic mediators through a process they referred to as "large pore hemofiltration" then continuously returning the blood back into the body. This process is similar to kidney dialysis, but the blood filtration with kidney dialysis is performed with a dialysis filter or a conventional hemofilter as opposed to the Inventors' "large pore" hemofilter.

11. The Inventors succeeded in their efforts. After extensive research, the Inventors were able to produce a filter that effectively removed a sufficient portion of the toxic mediators in the blood without removing other desirable substances from the blood. This ground-breaking concept was confirmed by rigorous testing.

12. In early 1993, the Inventors contacted patent counsel at Fulbright & Jaworski, retaining that firm to secure a patent for the Inventors' hemofiltration device with the United States Patent Office. The Inventors worked closely with patent attorneys in Fulbright &

Jaworski's office over the next couple of years, as the prosecution of the patent progressed. Lawyers at Fulbright & Jaworski, including Benjamin Aaron Adler, Sally Brashears-Macatee, Ronald Bliss, and C. Richard Martin, consulted the Inventors as to the technical aspects of the device, but the Inventors relied solely on Fulbright & Jaworski for the legal expertise in drafting and securing a valid and valuable patent. In particular, the Inventors relied on Fulbright & Jaworski's expertise to draft them a patent that would provide their invention with the broadest possible protection against infringement, and that would be relied on by potential industry and financial partners as being an effective patent. Given the vast untapped market that existed for this device, the Inventors recognized that the incentive for others to imitate their device was very strong and they wanted to ensure that the patent they ultimately obtained would adequately protect against any copy-cat devices. The Inventors and their patent counsel knew that the patent was needed for two purposes: (1) to exclude potential competitors from the market, and (2) to provide a valuable asset that would be relied on by potential industry or financial partners, who would insist on a good, solid patent before spending time and money on commercializing the invention.

13. On November 5, 1996, the patent (No. 5,571,418) was issued by the patent office.

14. Later, Plaintiffs sought the industry and financial partners they needed in order to proceed with the necessary clinical trials and commercialization of their invention. Plaintiffs were approached by Therakos, Inc., a subsidiary of Johnson & Johnson ("J&J"), one of the world's leading health care product companies.

15. Initially, Therakos was very excited by the prospects of entering into some sort of arrangement with the Plaintiffs to commercialize the invention. Therakos recognized the tremendous unexploited market for such a device. Moreover, Therakos was impressed with the

anticipated effectiveness of the invention, as shown by the results of the testing by the Inventors and also by other published medical research by independent researchers.

16. Therakos engaged in extensive due diligence over several months. The prospects of a deal looked increasingly promising. In fact, Therakos representatives told Plaintiffs that they (Therakos) wanted to come to Dallas to "talk about structuring a deal" with Plaintiffs.

17. Then, suddenly, on or about April 5, 2002, Therakos informed Plaintiffs that Therakos was no longer interested in pursuing discussions with Plaintiffs. The Plaintiffs were even more stunned to hear the reason why: J&J's patent lawyers had reviewed the patent and determined that, in their view, it suffered from a fatal flaw. Specifically, the J&J lawyers believed the patent attorneys at Fulbright & Jaworski had drafted the patent so that it provided no real protection from copy-cat devices and methods. In the opinion of the J&J lawyers, others would effectively be able to copy the device and method without infringing upon the Plaintiff's patent. In other words, in the opinion of the J&J lawyers, the patent was virtually worthless.

18. Regardless of whether the Plaintiffs' patent in fact is unable to exclude competitors, as J&J's lawyers thought, the wording of the patent was so poorly done that a reasonable company like J&J was unwilling to commit to working on commercializing the invention specifically because of the risk that the patent provided inadequate protection from competition.

19. In the prosecution of the patent, Fulbright & Jaworski's conduct fell below the standard of care which would have been exercised by reasonable patent attorneys. Due to Fulbright & Jaworski's negligence, the Plaintiffs have been damaged because reasonable industry and financial partners refuse to become involved with Plaintiffs in commercializing the invention. Accordingly, the Plaintiffs have suffered damages, including lost profits, lost

royalties, loss of time and money expended, and other remedial costs, as a result of Fulbright & Jaworski's professional negligence. In addition, as a result of Fulbright & Jaworski's negligence, Plaintiff James Matson lost significant professional and economic opportunities that would have come to him had he been recognized as the inventor of a commercially successful therapy for septic shock. Finally, and most importantly, numerous lives have been lost because Plaintiffs have not been able to bring their revolutionary invention to the market.

IV. CAUSES OF ACTION

Count 1: Legal Malpractice

20. Plaintiffs incorporate the preceding paragraphs by reference.

21. Fulbright & Jaworski owed Plaintiffs a duty of reasonable and ordinary care in the use and application of Fulbright & Jaworski's skill and knowledge to Plaintiffs' cause.

22. Fulbright & Jaworski's negligently breached that duty.

23. The breach by Fulbright & Jaworski proximately caused injury to Plaintiffs, including but not limited to lost profits, lost royalties and licensing fees and other remedial costs.

24. In addition, the grossly negligent conduct described in this complaint entitles Plaintiffs to recover exemplary damages against Fulbright & Jaworski pursuant to the Texas Exemplary Damages Act.

25. Plaintiffs further plead that any applicable statute of limitations has not run due to the application of the discovery rule and because of fraudulent concealment on the part of Fulbright & Jaworski. Plaintiffs also plead that the statute of limitations has not run because the parties in this matter entered a series of agreements tolling the statute of limitations.

V. JURY DEMAND

26. Plaintiffs request that all issues of fact be tried before a jury.

VI. RELIEF REQUESTED

Considering the premises, Plaintiffs request that this Court, upon final hearing, enter judgment against the Fulbright & Jaworski for the following relief:

1. Compensatory damages in an amount to be determined at trial;
2. Exemplary damages as alleged herein;
3. Costs of suit incurred herein;
4. Pre- and post-judgment interest as provided by law; and
5. Such other and further relief in law or in equity to which Plaintiffs may be justly entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served as shown below on counsel of record on May 27, 2005.

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